IT 11-0022-GIL 10/31/2011 CREDITS – REPLACEMENT TAX INVESTMENT

General Information Letter: Taxpayer provided insufficient information for the Department to provide guidance on qualification as a retailer.

October 31, 2011

Dear:

This is in response to your letter dated June 22, 2011 in which you state the following:

> I would like to request a General Information Letter regarding the IITA Section 201(e)(9)(D). This section deals with what qualifies as retailing in order to determine if the replacement tax investment credit is allowed assuming all other requirements are met.
>
> As defined in IITA Section 201(e)(9), retailing is defined as the sale of tangible personal property or services rendered in connection with the sale of consumer goods or commodities. The consumer goods and property sold must be sold to the ultimate consumer and not for resale. It states that farming operations related to the production of crops and livestock do not constitute retailing. However, it goes on to state that the marketing of such products would constitute a retailing operation.
>
> I have spoken with the Illinois Department of Revenue to obtain a definitive explanation as to what constitutes "marketing" and was referred to legal services to request more guidance on this issue as it pertains to grain elevators. COMPANY is primarily in the business of marketing corn and beans for their patrons. Does this type of marketing fall under the definition of "marketing" as it relates to IITA Section 201(e)(9)(D)?

According to the Department of Revenue ("Department") regulations, the Department may issue only two types of letter rulings: Private Letter Rulings ("PLR") and General Information Letters ("GIL"). The regulations explaining these two types of rulings issued by the Department can be found in 2 Ill.Adm.Code §1200, or on the website http://www.tax.illinois.gov/LegalInformation/regs/part1200.

Due to the nature of your inquiry and the information presented in your letter, we are required to respond with a GIL. GILs are designed to provide background information on specific topics. GILs, however, are not binding on the Department.

Your letter cites to Section 201(e)(9)(D) of the Illinois Income Tax Act ("IITA"; 35 ILCS 5/101 et seq.) for the definition of "retailing." The definition you refer to is not in IITA Section 201(e)(9)(D) but rather 86 Il.Admin.Code Section 100.2101(e)(9)(D) and states as follows:

> D) Farming operations related to crop and livestock production do not constitute retailing. However, the marketing of such products would constitute a retailing operation.

IITA Section 201(e) sets forth the statutory requirements to qualify for the Illinois replacement tax investment credit:

> (1) A taxpayer shall be allowed a credit equal to .5% of the basis of qualified property placed in service during the taxable year …
> (2) The term "qualified property" means property which is:
> (A) is tangible, whether new or used, including buildings and structural components of buildings and signs that are real property, …

(B) is depreciable pursuant to Section 167 of the Internal Revenue Code,
(C) is acquired by purchase
(D) is used in Illinois by a taxpayer who is primarily engaged … in retailing …; and
(E) has not previously been used in Illinois in such a manner and by such a person as would qualify for the credit provided by this subsection (e) or subsection (f).

(3) …the term "retailing" means the sale of tangible personal property for use or consumption and not for resale, or services rendered in conjunction with the sale of tangible personal property for use or consumption and not for resale.

Your letter does not provide enough information for a determination as to whether the COMPANY you refer to would qualify for the Illinois replacement tax investment credit. As pointed out in (3) above, a determination is needed as to whether COMPANY you refer to is engaged in the business of selling their services (which means they pay a Service Occupation Tax) or selling at retail tangible personal property (which means they pay a Retailers' Occupation Tax).

You mention that the COMPANY is "primarily in the business of marketing corn and beans for their patrons." What other activities does the COMPANY provide to their patrons? In order to determine whether a taxpayer is primarily engaged in an activity, the department must take into account all of the business operations in which the taxpayer engages. This is further described in 86 Il.Admin.Code Section 100.2101(f) which states:

f) To qualify for the credit, property must be used in Illinois by a taxpayer who is primarily engaged in manufacturing, or in mining coal or fluorite, or in retailing. It is not required that the property be used exclusively in manufacturing, mining of coal or fluorite or in retailing. So long as the taxpayer is primarily, more than 50%, engaged in one of these operations, all qualified property is eligible for the credit, even if the property is not actually used in an exempt manufacturing, coal or fluorite mining or retailing process. The taxpayer must engage primarily in one or more of the operations. In other words, a taxpayer that is engaged 30% of the time in retailing and 40% of the time in manufacturing will qualify for the credit, because the taxpayer is engaged primarily in one or more of the operations. In determining whether a taxpayer is primarily engaged in an activity the Department will look to the gross receipts of the taxpayer received in the ordinary course of business by that taxpayer. For example, if more than 50% of the taxpayer's gross receipts are from manufacturing, the taxpayer is primarily engaged in manufacturing, or if more than 50% of the gross receipts are from retailing, the taxpayer is primarily engaged in retailing. The taxpayer (and the Department) will look to the gross receipts received by the taxpayer in the ordinary course of business. Therefore, if, for example, the taxpayer suffers a casualty loss and that is compensated for by an insurance payment, the amount of money so received will not be deemed gross receipts received in the ordinary course of business, and disqualify the taxpayer from eligibility and perhaps result in the recapture of credits granted in prior years.

EXAMPLE 1: Corporation A manufactures CD ROM Units for personal computers, which are sold to others for resale. Corporation A also engages in the retail sale of canned computer software. Finally, Corporation A develops and sells custom computer software to various clients. Corporation A receives 20% of its gross receipts from the manufacturing of CD ROM Units, 40% of its gross receipts from retail sales of canned software, and 40% of its gross receipts from its custom computer

software development and sales operations. Corporation A is eligible for the credit. Corporation A is engaged primarily in manufacturing and retailing, because the total of its manufacturing and retailing operations is 80% of its gross receipts. Therefore, the Corporation is eligible for the credit.

EXAMPLE 2: Corporation B operates a hotel. 80% of the gross receipts of Corporation B are from the renting of rooms, 5% of the gross receipts are from the operation of a gift shop in the hotel and the remaining 15% of the gross receipts are from the operation of a restaurant and lounge in the hotel. The renting of rooms is not retailing. Therefore, Corporation B is ineligible for the credit because it is not engaged primarily in retailing, even though it does, through the operation of the gift shop, restaurant and lounge, engage in some retailing activities.

As stated above, this is a general information letter which does not constitute a statement of policy that either applies, interprets or prescribes tax law. It is not binding on the Department. Please send additional information for further analysis to my attention.

Sincerely,

Heidi Scott
Associate Counsel -- Income Tax